IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-796

MISSISSIPPI POWER & LIGHT COMPANY,
Petitioner

v.

UNITED GAS PIPE LINE COMPANY,
PENNZOIL COMPANY,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR UNITED GAS PIPE LINE COMPANY IN OPPOSITION TO PETITION

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BRIEF FOR UNITED GAS PIPE LINE COMPANY IN OPPOSITION TO PETITION

Respondent United Gas Pipe Line Company ("United") hereby files its brief in opposition to the petition for a writ of certiorari filed by Mississippi Power & Light Company ("MP&L").

OPINIONS BELOW AND JURISDICTION

The opinions below and the jurisdictional requisites are set forth in MP&L's petition for a writ of certiorari ("petition").

QUESTION PRESENTED

Whether the primary jurisdiction doctrine was properly applied in staying an interstate pipeline customer's damage suit against the pipeline for natural gas curtailments pending referral to the Federal Power Commission ("FPC") of factual and legal issues raised in the suit, some of which issues were already in the process of being decided by the FPC.

STATUTES INVOLVED

The following provisions of the Natural Gas Act, 52 Stat. 821-833 (1938), as amended, 15 U.S.C. §§ 717-717w, all of which are set out in Appendix A *infra,* are relevant to this proceeding:

Section 1(a), (b), 15 U.S.C. § 717(a), (b) (1970).
Section 4, 15 U.S.C. § 717c (1970).
Section 5(a), 15 U.S.C. § 717d(a) (1970).
Section 7(c), 15 U.S.C. § 717f(c) (1970).
Section 14(a), (b), 15 U.S.C. § 717m(a), (b) (1970).
Section 16, 15 U.S.C. § 717o (1970).

STATEMENT

United, a jurisdictional pipeline,[1] has facilities and operations centered in the "Gulf South" region, where it sells gas to local distribution systems for resale, to industrial customers for direct use, and to other interstate pipeline companies for transport and sale

[1] United transports natural gas in interstate commerce and hence the certification, transportation, curtailment and abandonment of such service is subject to the FPC's jurisdiction. In addition, United's sales for resale in interstate commerce are subject to the FPC's rate setting authority.

throughout the entire eastern half of the United States. Since November, 1970, United has been forced by the severe nationwide natural gas shortage [2] to curtail deliveries to its customers in the manner directed by its tariffs and by FPC curtailment orders.

A. The Instant Case

MP&L, a direct industrial customer of United, brought this breach of contract action against United and Pennzoil Company ("Pennzoil"), United's former parent, on August 30, 1974 for approximately $160 million in curtailment damages.[3] The jurisdiction of the District Court was invoked on the ground of diversity of citizenship. Liability was asserted on the grounds that United's curtailments of deliveries allegedly (1) constituted a breach of United's contractual daily delivery obligation, (2) resulted in a breach of United's obligation under the contract's so-called "substitute fuel clause" to reimburse MP&L for the added cost of using substitute fuels during curtailment,[4] (3) contradicted United's purported representation during contract negotiations that it could meet the contractual daily delivery obligation, and (4) were the product of an alleged conspiracy between Pennzoil

[2] The shortage has been judicially recognized by this and other courts. *See* FPC v. Louisiana Power & Light Co., 406 U.S. 621, 626 (1972); Other Southwest Area Rate Case (OSWA I), 484 F.2d 469, 473 (5th Cir. 1973), *cert. denied,* 417 U.S. 973 (1974).

[3] Suits have been filed against United by eight industrial customers seeking curtailment damages in excess of $1 billion.

[4] Petition, App. G at A35-A36. The substitute fuel clause provides for some limited reimbursement by United to MP&L depending upon the circumstances necessitating use of the substitute fuel. The relevant parts of the clause are set out in the petition, App. L at A134-A135.

and United to interfere with or breach United's contractual obligations to MP&L.

United answered *inter alia* that curtailments to MP&L were being effectuated pursuant to FPC orders and to tariffs approved by the FPC, which tariffs dictated the manner and size of each customer's curtailment and which expressly stated that curtailments were to be carried out "without liability" to United.[5] United also answered that its liability under the "substitute fuel clause" was limited to payment of the excess cost of substitute fuel used by MP&L for the first seven days of curtailments, and that to require United to pay MP&L's entire additional substitute fuel cost arising out of United's curtailments or to otherwise award MP&L curtailment damages would grant MP&L an undue preference and advantage in violation of the Natural Gas Act.[6] Finally, United answered that its gas shortage resulted from numerous and complex factors beyond its control, and that consequently it was excused from performance under the *force majeure* provisions of its tariff and contract and by the doctrine of impossibility of performance.[7]

United and Pennzoil also moved to dismiss or alternatively to stay the damage action pending exercise of the FPC's primary jurisdiction.[8] The District Court, finding that the FPC probably had jurisdiction over the controversy and that it was currently deter-

[5] Petition, App. L at A114-A121. Pennzoil's answer is in all material respects identical to United's. See petition, App. M at A142-A153.

[6] Petition, App. L at A134-A138.

[7] *Id.* at A127-A129.

[8] Petition, Apps. J, K at A103-A111.

mining the scope of that jurisdiction, concluded that referral to the FPC was appropriate and ordered the matters stayed until further order of the Court.[9]

MP&L then applied to the Court of Appeals, pursuant to 28 U.S.C. § 1292(b), for permission to appeal from the District Court's order. Neither United nor Pennzoil opposed this application and it was granted on May 28, 1975.[10] After appeal, the Court of Appeals affirmed, holding that referral to the FPC was "particularly appropriate" under the circumstances of this case.[11]

The Court of Appeals found first that the FPC "is presently involved in resolving issues which have a direct impact on civil litigation involving curtailment plans" and that, in particular, the FPC was "reviewing in some detail the facts and circumstances that resulted in the present shortage [on United's system]."[12]

Secondly, the Court of Appeals found that referral would materially aid the District Court with respect to at least "five specific components of the dispute": (1) the "facts and circumstances that resulted in [United's] severe shortage"; (2) interpretation and implementation of United's "exculpatory tariff" relieving it of curtailment damage liability; (3) "inter-

[9] Petition, Apps. E, F at A27-A31.

[10] Petition, App. B at A22.

[11] Petition, App. A at A15. The order was remanded for the limited purpose of having the District Court outline with more specificity the issues to be referred and the FPC proceedings to be completed before the litigation should resume. *Id.* at A18-A21.

[12] *Id.* at A15.

pretation of the United-MP&L contract provisions that might possibly limit damages . . ."; (4) resolution of MP&L's request to the FPC for compensation from customers having higher priority under the curtailment program; and (5) the impact of a damages award upon the FPC's ability to carry out its statutory curtailment responsibilities.[13]

Finally, the Court of Appeals found that "[n]one of the factors mitigating the applicability of the primary jurisdiction doctrine are present."[14] It found that the curtailment question was extremely complex, that the tariff might provide complete immunity, that there was no federal policy or statute entrusting the decision initially to the courts, and that the FPC had acknowledged that "damage actions could disrupt its resolution of the curtailment problem."[15]

B. FPC Proceedings

Closely linked to the instant case are various FPC proceedings involving United's curtailments that were referred to and relied upon by the Court of Appeals in its decision. The FPC is formulating a just and reasonable curtailment program for United pursuant to its statutory responsibilities as upheld by this Court in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972). One of the issues being reviewed by the FPC is whether United's past conduct created any undue preferences or advantages with respect to curtailments, an issue expressly remanded to the FPC by the

[13] *Id.* at A16-A17.

[14] *Id.* at A17.

[15] *Ibid.*

Court of Appeals in *State of Louisiana* v. *FPC*, 503 F.2d 844, 863-864 (5th Cir. 1974). Hearings in these proceedings were completed November 17, 1976, the issues are now being briefed to an administrative law judge, and the FPC is expected to issue its decision no later than the summer of 1977.

In further response to the Court of Appeals' remand in *State of Louisiana, supra,* the FPC instituted separate proceedings[16] (a) to determine the scope and effect of the "exculpatory provision" in United's tariff relieving it of curtailment liability and (b) to analyze more systematically the "substitute fuel clauses" in United's customer contracts, including the contract with MP&L. United filed its evidence in these proceedings on June 20, 1975, and substantial discovery has been undertaken against United since that time, but further action has been temporarily held in abeyance pending issuance of the referral order in this case.[17]

REASONS FOR DENYING THE PETITION

1. The decision below presents no conflict with the decision of any other Court of Appeals. On the contrary, the primary jurisdiction doctrine has been applied to each curtailment or analogous damage claim against interstate pipeline companies by every Court of Appeals that has considered the question. *Monsanto*

[16] United Gas Pipe Line Co., FPC Docket Nos. RP71-29, *et al.*, Orders issued March 7, 1975, April 2, 1975, May 2, 1975, and August 20, 1975.

[17] United Gas Pipe Line Co., FPC Docket Nos. RP71-29 *et al.* (Phase III), Order issued July 19, 1976 (App. B *infra*).

Co. v. *FPC*, 463 F.2d 799 (D.C. Cir. 1972);[18] *Atlanta Gas Light Co.* v. *FPC*, 476 F.2d 142, 151-52 (5th Cir. 1973); *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 226 F.2d 60 (6th Cir. 1955); *Interstate Natural Gas Co.* v. *Southern California Gas Co.*, 209 F.2d 380, 384 (9th Cir. 1953).

2. The decision below is in accord with prior decisions of this Court applying the primary jurisdiction doctrine. Thus (a) this case raises issues already in the process of litigation before the agency, *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 647-48 (1972); *Marine Engineers Beneficial Ass'n.* v. *Interlake S.S. Co.*, 370 U.S. 173, 185 (1962); (b) it raises technical or complex issues of fact that fall within the special competence and expertise of an administrative agency, *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 305-06 (1973); *United States* v. *Western Pacific R.R. Co.*, 352 U.S. 59, 63-64 (1956); *Far East Conference* v. *United States*, 342 U.S. 570, 574-75 (1952); *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422 (1940); (c) it involves questions concerning the validity or interpretation of a tariff sanctioned by the agency to which referral will be made, *Southwestern Sugar & Molasses Co.* v. *River*

[18] In this case, decided before the Court's holding in FPC v. Louisiana Power & Light Co., 406 U.S. 621 (1972), the D.C. Circuit reversed and remanded a district court's order dismissing the entire complaint and indicated that a stay was the more appropriate course. On remand the district court again dismissed the injunctive and declaratory relief counts of the complaint on the authority of *FPC* v. *Louisiana Power & Light, supra*, and stayed the damages claim pending exercise of the FPC's primary jurisdiction. Monsanto Co. v. United Gas Pipe Line Co., C.A. Nos. 2037-71, *et al.* (D.D.C., Jan. 10, 1973), (Jones, J.), *aff'd mem.* 489 F.2d 1272 (D.C. Cir. 1974).

Terminals Corp., 360 U.S. 411, 417-418 (1959); *United States* v. *Western Pacific R.R. Co., supra;* and (d) it is a case in which referral would secure "[u]niformity and consistency in the regulation of business entrusted to a particular agency," *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 421 (1965); *Far East Conference* v. *United States, supra* at 574.

The only decision seriously claimed by MP&L to conflict with the Court of Appeals' decision, *Nader* v. *Allegheny Airlines Inc.*, —— U.S. ——, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976), is not in point. In *Nader*, where the facts were not contested,[19] the Court held that a tort action against an air carrier for an alleged failure to disclose its deliberate overbooking practice need not be stayed pending referral to the Civil Aeronautics Board since the CAB could not immunize the air carrier from tort liability and since the immunity issue was the only one even arguably warranting referral.[20]

Moreover, as the following passage from *Nader* makes clear, the primary jurisdiction doctrine was expressly held inapplicable in that case because, unlike here, (a) there was no tariff provision applicable to

[19] 48 L.Ed.2d at 648.

[20] In a transparent attempt to approximate the facts in *Nader*, MP&L now characterizes its lawsuit as one for the "tortious making and breaking of a long-term contract" involving alleged "false misrepresentations [sic]". (Petition at 2, 7-8.) Even assuming *arguendo* that a bona fide tort claim for curtailment damages would *per se* circumvent the FPC's primary jurisdiction—an assumption contrary to *Nader*—MP&L's "tort" claim is clearly a recycling of its breach of contract claim, a conclusion further evidenced by MP&L's allegation in its complaint that the "fact" claimed to have been misrepresented was United's ability to perform its contractual obligations. Petition at A34-A35.

the alleged cause of action, (b) there was no challenge to exculpatory clauses included in the respondent's tariff limiting common law damages or to any other tariff clauses, and (c) there was no issue in the case whose resolution would be aided by the agency's expert and specialized knowledge:

> Petitioner seeks damages for respondent's failure to disclose its overbooking practices. He makes no challenge to any provision in the tariff, and indeed there is no tariff provision or Board regulation applicable to disclosure practices. Petitioner also makes no challenge, comparable to those made in Southwestern Sugar & Molasses Co. v. River Terminal Corp., supra, and Lichten v. Eastern Airlines, Inc., 189 F.2d 939 (CA 2, 1951), to limitations on common-law damages imposed through exculpatory clauses included in a tariff.
>
> Referral of the misrepresentation issue to the Board cannot be justified by the interest in informing the court's ultimate decision with "the expert and specialized knowledge," United States v. Western Pacific R. Co., supra, at 64, 1 L.Ed.2d 126, 77 S.Ct. 161, of the Board. The action brought by petitioner does not turn on a determination of the reasonableness of a challenged practice—a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry.[21]

Thus, none of the factors supporting the primary jurisdiction reference here were present in *Nader,* which, by its express reasoning, has no applicability to the instant case.

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[21] 48 L.Ed.2d at 655-56.

3. The decision below does not involve the "extraordinary" or "immediate and irreparable" effects normally required to obtain review of an interlocutory order. *See FPC* v. *Transcontinental Gas Pipe Line Corp.,* 423 U.S. 326 (1976); *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry.,* 148 U.S. 372, 384 (1893). *See generally, Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 584-585 (1952). MP&L's claim for damages has not been extinguished but rather has been temporarily deferred while it participates in FPC determinations on issues within the agency's primary jurisdiction.

4. MP&L has shown no basis for exercise of the Court's supervisory powers. It does not challenge the Court of Appeals' findings that FPC proceedings bearing on MP&L's damage suit are already underway. As for the action below that MP&L does challenge, the Court of Appeals correctly held that the FPC's "informed opinion will be of material aid to the district court" with respect to at least five specific components of the curtailment damage suit, and properly affirmed the District Court's discretionary referral of such matters to the FPC.

a. Facts and circumstances surrounding United's shortage

MP&L contends that referral of this issue was erroneous because the cause of United's shortage is purportedly not a component of the dispute and because the FPC allegedly has no special expertise in this area. (Petition at 8-9.) The first of these arguments is remarkable in view of MP&L's contradictory contentions here (Petition at 10-12) and to the courts

below [22] that United wrongfully created its shortage and that it therefore cannot avail itself of an exculpatory tariff relieving it of curtailment damage liability or of any other defense to the alleged breach of contract. The second argument is equally erroneous for the reason, among others, that it conflicts with this Court's recognition in *FPC* v. *Louisiana Power & Light Co., supra,* of the FPC's pervasive regulation over and familiarity with the gas acquisition, transportation, storage, sale and curtailment activities of

[22] For example, MP&L asserted to the Court of Appeals that the causes of United's shortage were at the heart of its lawsuit.

> The curtailment orders were the result of United's inability to discharge its contractural [sic] obligations. The orders did not prevent United from delivering its customers their entitlements. United could not deliver the entitlements before the curtailment orders were issued. United simply wrongfully and negligently continued to sell gas faster than it purchased new gas supplies, and thus wrongfully created the need to curtail. The exculpatory provision of proposed Section 12.3 would only relieve United from liability if the FPC curtailment orders rendered performance impossible. The provision would not absolve United if its default was [sic] due to its own wrongs, which created a shortage on its system necessitating the issuance of the curtailment orders. (Brief of Appellant at 18-19.)

Moreover, in opposing the dismissal or stay sought by United and Pennzoil, MP&L argued to the District Court as follows:

> It was because United had contracted to sell more gas than it had contracted to purchase that the FPC found it necessary to issue the curtailment orders. The curtailment orders did not make it impossible for United to discharge its contractual obligations; the curtailment orders were due to United's own fault. Had United not, through its own fault, continued making new gas sales contracts, and enlarging volumes to be delivered under old contracts, and had it not released large volumes of gas it had contracted to purchase, and had it not decreased volumes of gas purchased under new contracts, there would have been no curtailment orders, and no need for curtailment. (Memorandum in Opposition to Motions to Dismiss or Alternatively to Stay at 28-29.)

United and other interstate pipelines, which regulatory responsibilities and familiarity give the FPC the requisite "specialized competence" warranting referral. *See United States* v. *Western Pacific R.R.,* 352 U.S. 59, 64-65; *Far East Conference* v. *United States,* 342 U.S. 570, 574-75 (1952).

b. Exculpatory tariff issues

In contrast to its position on referral of the facts and circumstances surrounding United's shortage, MP&L argues that referral of the validity and scope of United's exculpatory tariffs would be erroneous because United wrongfully created its need to curtail and because no tariff could lawfully exculpate under these circumstances. (Petition at 10-12.) To begin with, the assertions beg the questions of whether United's curtailments were wrongfully caused and, assuming this were so, whether United's tariffs could relieve it of some or all of the curtailment damages sought by MP&L. Furthermore, the cases cited by MP&L, *Nader* v. *Allegheny Airlines Inc., supra; Gordon* v. *New York Stock Exchange,* 422 U.S. 659 (1975); *Breen Air Freight, Ltd.* v. *Air Cargo Inc.,* 470 F.2d 767 (2d Cir. 1972), *cert. den.* 411 U.S. 932 (1973); *Bisso* v. *Inland Waterways Corp.,* 349 U.S. 85 (1955), do not support its position.

None of these cases involved a tariff filed with a regulatory agency, and all except *Bisso* turned on whether the statutory scheme completely immunized the defendant. Thus in *Nader,* as discussed above, the Court found no statutory basis for the immunity claimed, and expressly distinguished the case from bona fide primary jurisdiction cases on the ground *inter alia* that there was no exculpatory tariff involved.

In *Gordon,* the Court held that fixed commission rates utilized by the stock exchanges *were* immune from the antitrust laws by virtue of the Securities Exchange Act of 1934,[23] and found further that the issue was so free from doubt as not to require deference to a regulatory agency in order to take advantage of its special expertise. *Gordon* v. *New York Stock Exchange,* 422 U.S. 659, 686 (1975). The issue in *Breen* was whether certain agreements entered into by the defendants immunized them or could be found by the Civil Aeronautics Board to immunize them from alleged violations of the antitrust laws. The Second Circuit, holding that the agreements had not been executed by "air carriers" subject to the CAB's authority, or alternatively finding that the agreements had been neither filed with nor explicitly approved by the CAB, held that a primary jurisdiction reference to the CAB was unnecessary. *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.,* 470 F.2d 767, 772-74 (2d Cir. 1972).

MP&L's reliance on *Bisso* is particularly misplaced. In *Bisso* the Court struck down an exculpatory provision in a private contract that would have relieved a party of liability irrespective of negligence. However, where a similar exculpatory provision was contained in a regulated entity's *tariff*, a situation identical to that presented here, the Court distinguished Bisso and held that a determination on the tariff's validity lay within the primary jurisdiction of the Interstate Commerce Commission. *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.,* 360 U.S. 411, 416-17 (1959).

[23] 15 U.S.C. § 78s(b) (1970).

c. Contract issues

No basis for review exists in MP&L's assertion that seeking the FPC's "interpretation" of contract provisions that might possibly limit damages would be error because such interpretation would not be binding on the courts. (Petition at 13-14.) Since the FPC, pursuant to an earlier Fifth Circuit remand in *State of Louisiana, supra,* has already begun proceedings to construe one such contract provision—the "substitute fuel clause"—and since the FPC is intimately familiar with natural gas service contracts such as that in issue here, the Court of Appeals correctly found that the FPC's interpretation of the substitute fuel and other disputed contract provisions could materially aid the District Court.

d. Compensation proposals

At the urging of MP&L and others, the Court recently denied certiorari of the Fifth Circuit's decision which (i) held that the FPC has jurisdiction to consider whether United's curtailed customers should be compensated for some of the cost of curtailments by higher priority customers who are not being curtailed or who are being curtailed less heavily, and (ii) directed that all such compensation proposals be considered in the context of United's curtailment program. *Mississippi Public Service Comm.* v. *FPC,* 522 F.2d 1345 (5th Cir. 1975), *cert. denied* 50 L.Ed.2d 149 (1976). Before the FPC has had an opportunity to exercise its jurisdiction, however, MP&L in effect would have this Court declare that such compensation proposals cannot have any impact on a customer's right to curtailment damages. Contrary to MP&L's premature assertions, the Court of Appeals correctly

decided that the FPC should determine the interrelationship of compensation proposals and the damage suits against United—both being devices to shift the economic burden of curtailment.

e. The effect of damages on the allocation decision

MP&L also claims that whether a damage award to MP&L might adversely affect the FPC's ability to carry out its curtailment responsibilities on United's system—the final question referred—is an illusory issue since United allegedly would still have to follow the FPC's curtailment orders notwithstanding the imposition of a huge curtailment damage award in favor of MP&L. (Petition at 15.) But the question here is whether an award of money in lieu of gas would compromise the integrity of the FPC's curtailment authority and/or whether such award would gravely impair United's ability to continue rendering service to its other customers. Since the Natural Gas Act requires that gas service be rendered in a nonpreferential and nondiscriminatory manner consistent with the public interest, and since the present dimensions of the natural gas shortage and the depth of curtailments might well make payment of damages to one curtailed customer a violation of the statute, the Court of Appeals' conclusion that the FPC should address this issue preliminarily was correct.

5. The stay does not exceed the bounds of moderation or "unduly delay" the prosecution of the litigation. (Petition at 16-20.) Since FPC decisions on certain issues, *e.g.*, the effect of United's exculpatory tariffs, might be dispositive of the litigation, a dismissal of the case instead of the more moderate stay

would have been justified. *See Far East Conference* v. *United States, supra.* MP&L's claim for damages is not being prejudiced by agency action prior to trial inasmuch as its suit seeks solely monetary damages. Finally, it is MP&L's own actions that have delayed the FPC proceedings which could resolve issues central to this and companion litigation.[24]

Finally, MP&L's assertions that the FPC "is understaffed and overworked" (Petition at 19) is extra-record speculation that furnishes no basis for granting the petition. This Court is well aware that federal courts as well as federal agencies have severe workloads. In the instant case, MP&L's refusal to acquiesce in an accommodation of agency and judicial responsibilities—despite the fact that referral to the FPC was ordered by the District Court almost two years ago—has caused a delay in orderly agency consideration of the issues in question that the Court should not extend further.

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[24] MP&L has repeatedly sought a stay of the Court of Appeals' mandate pending the filing of its petition for a writ of certiorari, thereby ensuring that no action could be taken by the District Court in defining the issues to be referred as ordered by the Court of Appeals. Similarly MP&L, arguing that the FPC's jurisdiction over issues in its damage suits was being litigated in the courts, has been instrumental in stalling the FPC proceedings that were commenced to consider the tariff and contract questions remanded in *State of Louisiana* v. *FPC*. See p. 7 *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Natural Gas Act 52 Stat. 821-833 (1938), as amended, 15 U.S.C. § 717-717w

Section 1(a), (b), 15 U.S.C. § 717(a)(b) (1970).

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. [52 Stat. 821 (1938); 15 U.S.C. § 717(a)]

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 4, 15 U.S.C. § 717c (1970).

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to

such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be give by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into

effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep ac-

curate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5(a), 15 U.S.C. § 717d(a) (1970).

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new scheule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

Section 7(c), 15 U.S.C. § 717f(c) (1970).

SEC. 7. (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commision, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and

such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

Section 14(a), (b), 15 U.S.C. § 717m(a), (b) (1970).

SEC. 14. (a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this act or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this act or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation to the Congress. The Commission may permit any person to file with it a statement in writing, under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish in the manner authorized by section 312 of the Federal Power Act, and make available to State commissions and municipalities, information concerning any such matter.

(b) The Commission may, after hearing, determine the adequacy or inadequacy of the gas reserves held or controlled by any natural-gas company, or by anyone on its behalf, including its owned or leased properties or royalty contracts; and may also, after hearing, determine the propriety and reasonableness of the inclu-

sion in operating expenses, capital, or surplus of all delay rentals or other forms of rental or compensation for unoperated lands and leases. For the purpose of such determinations, the Commission may require any natural-gas company to file with the Commission true copies of all its lease and royalty agreements with respect to such gas reserves.

Section 16, 15 U.S.C. § 717o (1970).

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

UNITED GAS PIPELINE COMPANY
DOCKET NOS. RP71-29, *et al.* (Phase III)

Order Denying Motion of United to Lodge Opinion and to Affirm Ruling of Presiding Judge

(ISSUED JULY 19, 1976)

On June 10, 1976, United Gas Pipeline Company ("United") presented a motion for lodging the decision of the United States Court of Appeals for the Fifth Circuit in *Mississippi Power & Light Company* v. *United Gas Pipe Line Company,* No. 75-2316 (5th Cir. May 27, 1976), and, based on the decision, for affirmance of the Presiding Administrative Law Judge's ruling striking portions of United's testimony, which is a matter pending before the Commission on certification by the Judge.

The decision in *Mississippi Power & Light Company* v. *United Gas Pipe Line Company, supra,* resulted from a suit in the United States District Court for the Southern District of Mississippi by Mississippi Power & Light Company against United and its former parent, Pennzoil Company, for breach of contract and alleged failure by United to supply contractually required amounts of gas. The District Court granted a stay of the court proceeding to await the exercise by the Commission of its primary jurisdiction by resolving issues relevant to contract liability in the administrative proceeding in this docket. The Fifth Circuit

Court of Appeals, on review of the stay order, agreed with the action of the District Court but remanded the order to permit the District Court to make its order more specific by stating which issues might be referred to the Commission for exercise of primary jurisdiction.

The Court of Appeals suggested five areas in which it believes the Commission's assistance might be significant to the District Court:

> First, the Commission can determine in detail the facts and circumstances that resulted in the severe shortage United is experiencing . . . . Second, the Commission could determine whether to accept an exculpatory tariff from United such as proposed § 12.3 . . . . Third, the Commission's interpretation of the United MP&L contract provisions that might possibly limit damages would aid a court in the ultimate decision . . . . Fourth, the Commission is presently reviewing a request from MP&L for compensation from the customers of United who receive higher priorities . . . . Finally, the Commission could clearly articulate whether in its view the presence or absence of damages significantly affects the allocation decision.[1]

The motions to strike United's evidence in Phase III which the Presiding Administrative Law Judge refused to grant were based on the premise that the Commission had no jurisdiction to determine questions bearing on United's contract liability. United views the decision in *Mississippi Power & Light Company* v. *United Gas Pipe Line Com-*

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[1] Slip Opinion at p. 3661. It should be noted as to the fourth area, that, as a result of the decision in *Mississippi Public Service Commission, et al.* v. *F.P.C.*, 522 F.2d 1345 (5th Cir. 1975), the Commission has filed a petition for writ of certiorari with the Supreme Court presenting the question of whether the Commission is authorized under the Natural Gas Act to consider compensation schemes.

pany, supra, as an affirmance of the Commission's jurisdiction to consider such questions, and as dispositive of the objections to the evidence not stricken. United therefore urges that we affirm the Judge's ruling and direct prompt resumption of Phase III hearings.

A joint answer to United's motion has been filed by Allied Paper Incorporated, Gulf States Utilities Company, Mississippi Power & Light Company, Monsanto Company, New Orleans Public Service Inc. and Texasgulf Inc. Answers have also been filed by International Paper Company and Commission Staff. These answers all oppose United's motion and recommend that a determination with regard to the matters certified by the Judge be deferred until the District Court takes action on the order remanded by the Court of Appeals.

One of the matters certified by the Judge is guidance as to the proper scope and the evidentiary limits of Phase III. Without expressing any opinion at this time as to the nature of the assistance this Commission might in its discretion render to the District Court, we anticipate that any new factual inquiry which might proceed from a referral from the District Court would be assigned to Phase III. Such assignment would require redefinition of scope of Phase III. Thus, it appears appropriate to deny United's Motion at this time and to defer providing guidance as to scope or evidentiary limitations in the proceedings in this docket pending judicial action.

This determination is without prejudice to a renewal of United's motion at a later time.

The Commission finds and orders:

Good cause has not been shown for granting United's Motion and it is denied.

By the Commission.

(SEAL)

KENNETH F. PLUMB.
Secretary.